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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT,
JANICE THOMAS, AUGUSTUS HUMPHERY,
JUANITA UMPHRYES,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

APPLICATION FOR REHEARING ON PETITION FOR CERTIORARI.

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Petitioners respectfully request that this Court grant rehearing of its order dated April 26, 1965, which denied certiorari, and that the Court now grant certiorari.

I.

The Petition for Certiorari previously filed herein presented the following questions:

> 1. Whether the petitioners' convictions under R. C. of Ohio § 2915.13 is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the admission of evidence seized in violation of the "constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain"?
>
> 2. Whether a sufficient basis for the determination that probable cause existed to support the is-

suance of a search warrant was afforded by an affidavit which merely alleged:

a. that various items generally associated with the numbers game were in the possession of unknown persons, and

b. that such items were possessed by these "unknown persons" with the intent by them to commit a crime involving the numbers game, and

c. that affiant's belief was predicated on observation by the Cleveland Police and information from confidential sources.

3. Whether a state court can refuse to require disclosure of an unnamed and unidentified informer where no probable cause can be shown to exist without the information of such informer?

4. Where an officer seeks a warrant based in part upon information supposedly supplied by an informer, whose identity is neither disclosed in the affidavit, nor inquired into by the magistrate, and where the affidavit does not disclose any basis for crediting the informer's information, can a trial court:

a. refuse to require that the identity of such informer be disclosed, and/or

b. allow the officer to conclusively establish that an alleged informer is reliable simply by affirming that he had supplied information in the past that was accurate.

5. Can a State authorize the practice of permitting applicants for warrants to bolster their affidavits by rendition of secret and unrecorded testimony to issuing magistrates; or, is the requirement of the constitution such that an affidavit is fatally defective when "it does not set forth any * * * sufficient basis upon which a finding of probable cause could be made," notwithstanding any supporting evi-

dence that may have been considered by the issuing magistrate, but was not a part of the affidavit?

6. Whether a police officer can trespass upon private property in violation of the Constitution and state law, there secretly eavesdrop, and use what was supposedly heard as a basis for the establishment of probable cause for the issuance of a search warrant?

II.

The Petition for Certiorari developed the very real danger that, should this Court not intervene, the grudging applications Ohio Courts continue to give the constitutional standards developed by this Court will have found, in the cause, tacit approval of tactics that cannot be squared with the constitution. And, although it is conceded that none of the Courts in Ohio, that considered this cause, expressly approved the affidavit and the warrant issued, which warrant merely set forth that it was based on "observation by members of the Cleveland Police Department and information from confidential sources," it would tax credulity not to suppose that those same Courts will not view this Court's refusal to even consider the matter as a vindication of the patently erroneous notion that the requirements of the constitutions can be satisfied, and the prohibition against conclusory statements allayed, by mere testimony that additional information—not a part of the affidavit—was considered by the issuing magistrate. Further, that such belated assertions are sufficient, controlling and conclusive, even though the magistrate has no recollection of this additional information having been given, and the evidence offered in support of such thesis is not without serious conflict; so much so, as to create a real doubt that it did in fact happen.

III.

Moreover, subsequent to the filing of the original petition herein, this Court rendered its opinion in *United States v. Ventresca*, 380 U. S. 102 (1965), which opinion supports the argument made herein, but which, because of obvious reasons could not be developed in the original petition. Further, in our judgment, the *Ventresca* decision compels the premise, if nothing else, that something more than the mere conclusions of an affiant must be disclosed in the affidavit. Although in the *Ventresca* affidavit there was an abundance of statements, of dubious significance, it cannot be overlooked that the person arrested was the person being investigated. Further, the information, whatever it was, related to the person whose premises were ultimately searched. In this cause as argued in the petition, these officers did not know prior to entry, that any of the persons ultimately arrested were even on the premises. And all of the persons seen entering on prior days were strangers to the police. Also, it was necessary for the officer to trespass, in violation of an express state law, in order to obtain information to aid their quest for probable cause.

In our judgment, never will this Court have a clearer case, upon which it can delineate the basis upon which affidavits for warrants can be, if ever, supplemented by oral testimony. And surely this Court must eventually decide that even such additional factors, if approvable, must disclose either by themselves, or in conjunction with the affidavits, the existence of probable cause. Also, the Court can deem this an apt fact situation, to support the foreordained announcement that by the mere failure of a State Court to relate whether or not a conviction rests on independent state grounds, or that a decision on the federal question was essential to the state court judg-

ment, cannot defeat the jurisdiction of this Court, or otherwise handicap one who seeks to appeal on constitutional grounds.

For the above reasons, petitioners respectfully pray that this Court grant a Rehearing.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

JAMES R. WILLIS,
Attorney for Petitioners.